

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:	) Chapter 15 Case
FAIRFIELD SENTRY LIMITED, et al.,	) Case No. 10-13164
Debtors in Foreign Proceedings.	) (CGM)
	) Jointly Administered
FAIRFIELD SENTRY LIMITED (IN LIQUIDATION), et al.,)
Plaintiffs,	) Adv. Pro. No. 10-03496
– against –	) (CGM)
THEODOOR GGC AMSTERDAM, et al.,	) Administratively
Defendants.	) Consolidated
FAIRFIELD SENTRY LIMITED (IN LIQUIDATION), et al.,)
Plaintiffs,)
v.	) Adv. Pro. No. 10-03635
ABN AMRO SCHWEIZ AG a/k/a ABN AMRO (SWITZERLAND) AG, et al.,	) Adv. Pro. No. 10-03636
Defendants.	) (CGM)

STIPULATION AND ORDER REGARDING SERVICE

Consolidated Plaintiffs¹ and Stipulating Defendants in the above-captioned adversary proceeding (the “Action”), by and through undersigned counsel, state as follows:

¹ Except where otherwise noted, references to (i) “Consolidated Plaintiffs” are to Kenneth Krys and Greig Mitchell (or their predecessors) as Liquidators and Foreign Representatives of all three funds—Fairfield Sentry Limited (In Liquidation), Fairfield Sigma Limited (In Liquidation), and Fairfield Lambda Limited (In Liquidation), (ii) “Stipulating Defendants” are to defendants listed in Exhibit A hereto and (iii) “Moving Defendants” are to defendants listed in Appendix A to the Consolidated Reply Memorandum of Law in Further Support of Defendants’

WHEREAS, on December 14, 2020, the Court issued the Memorandum Decision Granting in Part and Denying in Part Defendants' Renewed Motion to Dismiss (Dkt. 3062) ("*Fairfield III*"),² in which, among other things, the Court granted the Consolidated Plaintiffs' request to effect service on HSBC Private Bank (Suisse) SA ("HSBC Suisse") through its U.S.-based counsel under Federal Rule of Civil Procedure 4(f)(3);

WHEREAS, on April 21, 2021 the Court held a conference at which it ordered all Moving Defendants who had not previously accepted or waived service of process either to enter into a stipulation resolving service in accordance with the rulings in *Fairfield III* or to seek dismissal of their respective adversary proceedings on the basis of a renewed motion under Fed. R. Civ. P. 12(b)(5) on or before May 21, 2021;

WHEREAS, the Stipulating Defendants have not waived service of process and do not, through this stipulation, waive service of process;

WHEREAS, none of the Stipulating Defendants' U.S. counsel have been authorized to accept service on the Stipulating Defendants' behalf;

NOW, for the reasons set forth in *Fairfield III*, and a subsequent order issued on February 22, 2021 (Dkt. 3076), which are incorporated herein and attached hereto as Exhibits B and C, respectively, **IT IS HEREBY STIPULATED, AGREED, AND SO ORDERED, THAT:**

1. The Consolidated Plaintiffs do not dispute that their prior mail service on the Stipulating Defendants did not satisfy the requirements of the Hague Service Convention; provided, however, that, in the event that the Consolidated Plaintiffs prevail in their pending appeal

Renewed Motion to Dismiss (Dkt. 3036) comprised of defendants in all adversary proceedings in the above-captioned administratively consolidated proceedings that filed or joined the Second Consolidated Motion to Dismiss.

² *In re Fairfield Sentry Ltd.*, No. 10-13164 (SMB), 2020 WL 7345988 (Bankr. S.D.N.Y. Dec. 14, 2020). Capitalized terms used but not defined herein shall have the meanings ascribed to them in *Fairfield III*.

of this Court's prior ruling that these adversary proceedings are not "with respect to" the subscription agreements, nothing in this stipulation shall affect the Consolidated Plaintiffs' ability to argue that mail service was appropriate as to all Defendants under the subscription agreements, nor any Defendants' rights or defenses in respect of any such argument.

2. Subject to the reservation of rights set forth in paragraph 5 herein, the Court's findings, conclusions, and determinations regarding service of process set forth in *Fairfield III* are applicable, or otherwise made applicable, and binding upon the Stipulating Defendants except for the Court's findings that: (a) HSBC Suisse was in regular contact with its U.S. counsel, Cleary Gottlieb Steen & Hamilton LLP ("Cleary Gottlieb"), and has actively participated in the adversary proceeding *Fairfield Sentry Ltd. v. HSBC Private Bank Suisse SA*, Adv. Proc. No. 10-3633 (CGM) (the "HSBC Action") since at least September 2010; (b) the Consolidated Plaintiffs attempted service on Cleary Gottlieb in respect of the HSBC Action by mail; (c) HSBC Suisse was served the summons and initial complaint in Switzerland by international mail; (d) re-serving HSBC Suisse and the other Swiss Defendants in the forty-two actions listed in Appendix G to the Consolidated Memorandum of Law in Support of Defendants' Renewed Motion to Dismiss Pursuant to 11 U.S.C. §§ 561(d), 546(e), and 546(g) and for Insufficient Service of Process Under the Hague Service Convention (Dkt. 2903) would cost \$272,441 and the process would take four months or more; and (e) HSBC Suisse has had actual notice of the HSBC Action and has actively litigated for a decade through capable counsel.

3. Subject to the reservation of rights set forth in paragraph 5 herein, the Consolidated Plaintiffs shall proceed to effectuate alternative service under Federal Rule of Civil Procedure 4(f)(3) by serving the Stipulating Defendants' U.S. counsel by first class mail within sixty days of entry of this Stipulated Order.

4. So long as the Court's opinion in *Fairfield III* has not been reversed, vacated or otherwise modified with respect to service, the Stipulating Defendants shall not challenge the adequacy of service in any further proceedings in this Court or any other U.S. forum except on appeal from this Court's rulings to the United States District Court for the Southern District of New York, the United States Court of Appeals for the Second Circuit, or the United States Supreme Court in accordance with the reservation of rights contained in paragraph 5 hereof.

5. Nothing herein shall be deemed to be a waiver of service of process by any Stipulating Defendant, nor an acceptance of service of process by U.S. counsel for any Stipulating Defendant. Further, except as expressly resolved in this Stipulated Order, *Fairfield I*, *Fairfield II*, *Fairfield III*, the subsequent order issued on February 22, 2021, or the prior stipulated orders implementing those decisions, all parties' rights and defenses, including all appellate rights, which, for the avoidance of doubt, include the Defendants' rights to appeal any ruling applicable or otherwise made applicable to any Defendant via stipulation as here, are expressly preserved, including for the avoidance of doubt, the right to further contest service of process in the event that *Fairfield III* is subsequently reversed, vacated or otherwise modified with respect to service as stated in paragraph 4.

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Dated: New York, New York
May 21, 2021

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**Dated: September 1, 2021
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/s/ Cecelia G. Morris

**Hon. Cecelia G. Morris
Chief U.S. Bankruptcy Judge**